Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs

1987

Amador Arevalo v. The Board of Review of The Industrial Commission of Utah : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the Law Commons

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
David L. Wilkinson; Linda Wheat Field; Attorney for Defendant.
Michael E. Bulson; Attorney for Plaintiff.

Recommended Citation
Legal Brief, *Arevalo v. Board of Review*, No. 870014 (Utah Court of Appeals, 1987).
https://digitalcommons.law.byu.edu/byu_ca1/309

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF
AH
CUMENT
U
D
CKET NO. 870014

IN THE COURT OF APPEALS OF

THE STATE OF UTAH

AMADOR AREVALO, Plaintiff-Appellant, v. THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, Defendant-Respondent.	Case No. 870014-CA Category No. 6

PETITION FOR REHEARING

Petition for rehearing from a decision of the Court of Appeals entered November 24, 1987, affirming the determination of the Industrial Commission that Plaintiff's appeal was not timely filed and not delayed for good cause.

DAVID L. WILKINSON
Attorney General of Utah
State Capitol Building
Salt Lake City, Utah 84114

LINDA WHEAT FIELD
Special Assistant
Attorney General
Department of Employment Security
1234 South Main Street
P. O. Box 11600
Salt Lake City, Utah 84147

Attorneys for Defendant

MICHAEL E. BULSON (0486)
UTAH LEGAL SERVICES, INC.
385 - 24th Street
Suite #522
Ogden, Utah 84401

Attorney for Plaintiff

IN THE COURT OF APPEALS OF

THE STATE OF UTAH

AMADOR AREVALO,	)	
Plaintiff-Appellant,	)	
v.	)	Case No. 870014-CA
THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,	)	Category No. 6
Defendant-Respondent.	)	

PETITION FOR REHEARING

Petition for rehearing from a decision of the Court of Appeals entered November 24, 1987, affirming the determination of the Industrial Commission that Plaintiff's appeal was not timely filed and not delayed for good cause.

DAVID L. WILKINSON
Attorney General of Utah
State Capitol Building
Salt Lake City, Utah 84114

LINDA WHEAT FIELD
Special Assistant
Attorney General
Department of Employment Security
1234 South Main Street
P. O. Box 11600
Salt Lake City, Utah 84147

Attorneys for Defendant

MICHAEL E. BULSON (0486)
UTAH LEGAL SERVICES, INC.
385 - 24th Street
Suite #522
Ogden, Utah 84401

Attorney for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

RULES AND REGULATIONS CITED

STATUTES CITED

IN THE COURT OF APPEALS OF

THE STATE OF UTAH

AMADOR AREVALO, Plaintiff-Appellant,	)	
v.	)	Case No. 870014-CA
THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, Defendant-Respondent.	)	Category No. 6

PETITION FOR REHEARING

Pursuant to Rule 35 of the Rules of the Utah Court of Appeals, plaintiff, by and through his attorney of record, hereby respectfully petitions the court for rehearing of the decision entered in his case on November 24, 1987. He makes his petition based upon the points set forth below.

A. The Court's Decision Fails To Address An Important Constitutional Issue Raised In Plaintiff's Appeal: That He Was Deprived of His Right to Due Process by the Defendant's Failure to Provide Him Proper Notice of the 1983 Overpayment Determination and of the Time Limits for Making A Late Appeal.

Plaintiff has a constitutionally protected property interest in his right to receive unemployment compensation benefits. Gray v. Department of Employment Security, 681 P.2d 807, 817 (Ut. 1984) Under the Utah and United States constitutions, a person may only be deprived of a property interest after being afforded due process of law.

Boddie v. Connecticut, 401 U.S. 371 (1971) The right to timely and adequate notice and an opportunity to be heard in a meaningful way is the heart of procedural fairness. Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Ut. 1983) In reviewing constitutional challenges, the Court of Appeals should apply a correction of error standard. Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, 608 (Ut. 1983)

Plaintiff has raised an important constitutional issue in his appeal, namely: that he never actually received notice of his hearing rights. There is no dispute between the parties that plaintiff never received the March 11, 1983 decision. Not only was plaintiff not advised of his right to a hearing and of the time limits for filing a request, but he was actually misled by statements made by Job Service employees. The record shows that the employees advised plaintiff that he owed the money and that he had no recourse other than to repay it. (R-50,55) The same advice was given to plaintiff's wife by Job Service employees. Plaintiff's wife testified that the employees told her, "Well there's nothin' that can be done. He just has to pay what he received every week back." (R-56)

Plaintiff was unusually vulnerable to the misleading advice that deprived him of his right to due process. At the time he contacted the Job Service office, he was illiterate in English, both spoken and written. In addition, the record indicates that he felt threatened by a

warrant for his arrest which reportedly had been issued. The testimony of both plaintiff and his wife shows that he was under the real fear of being arrested if he did anything other than pay the amount claimed. (R-39,57) At the hearing, the Administrative Law Judge asked claimant's wife whether the Job Service employee, Mr. Larsen, had advised her of her husband's appeal right. She answered, "No... he told me then that there was nothin' that could be done, that that money had to be paid back." (R-58)

There is no evidence in the record that plaintiff was given clear and explicit notice concerning his right to request a hearing within ten days. The Job Service worker, Mr. Larsen, testified that he did not recall giving any specific instruction or information to Mr. Arevalo concerning the right to file for a hearing. He stated his general advice as follows:

> JUDGE But do you--you don't have any recollection of a conversation that you had with either Mr. or Mrs. Arevalo regarding this particular claim? Or what instructions or information you would've given?
>
> LARSEN I'm sorry I don't. I talk to several hundred people a month. But that would be normal procedure on a prior fraud overpayment to advise them that it needed to be paid back.[1] And if there was any questions as to what the overpayment was, advise them how to find out more about the overpayment, and if it was correct. And to appeal it, I guess,

---

[1]It is revealing to note that the first advice recalled by Mr. Larsen was to tell the inquirer that the amount had to be paid back. The possible advice of appealing is third on the list and equivocal in Larsen's statement ("I guess").

> if--if they just flat out didn't agree with it or was never notified of it. (R-61)

When the record is reviewed carefully, there is no basis for the court's conclusion that plaintiff was not misled by the statements of the Job Service employees. Rather, all of the evidence indicates that both he and his wife were misled.

The instant case is distinguishable from the cases relied on in the court's decision. In Pacheco v. Board of Review, 717 P.2d 712 (Ut. 1986) the facts show that, "Pacheco received the decision on June 11." Id., at 713. In Thiessens v. Dept. of Employment Security, 663 P.2d 72 (Ut. 1983) the evidence showed that although the claimant alleged he had never received notice, he had actually received approximately forty benefit checks mailed to the same address where the notice was sent. In Wood v. Dept. of Employment Security, 680 P.2d 38 (Ut. 1984), the claimant testified that although it was late, he did actually receive a notice wherein he was advised of his appeal rights. In all of these cases, the claimant received actual physical notice of an unfavorable decision and was, therefore, fully advised of his appeal rights. Such notice did not occur in plaintiff's case. Had plaintiff received actual notice of his right to request a hearing, or even if there were some evidence that Job Service employees orally advised him of his rights, his case would be controlled by the cases cited in the opinion. He did not; consequently, the deprivation of an important right without notice must be addressed.

Unless the constitutional issue is addressed, plaintiff will be deprived of a hearing on the merits of his case and subjected to a harsh penalty. The law in effect at the time plaintiff's case arose imposed a penalty requiring repayment of twice the amount overpaid. In addition, the person assessed a fraud overpayment is ineligible for benefits and waiting week credit until the amount is repaid.[2] Case law has established that a right to proper notice and an opportunity for a hearing on the merits is particularly important when the person affected is being sanctioned. FTC v. Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986) Given the severe penalty involved, fairness would be best served by allowing plaintiff to prove that he did not commit fraud. The court is not required to show any deference to the Board's decision, since on constitutional violations, it is to apply a correction of error standard.

B. The Court Has Overlooked the Fact That Defendant's Own Regulations Provide That a Hearing May Be Requested Within Ten Days of Actual Receipt of the Decision.

The Administrative Law Judge in his questioning of the plaintiff established that he had not received an actual copy of the March 11, 1983 decision until the day of his hearing. (R 49-50) The defendant's regulations which

---

[2]This law has since been amended to remove the harsh double penalty, but the change is not retroactive.

permit a late filing within ten days use the language: "actual receipt of the decision," not constructive notice imparted by Job Service employees. Utah Dept. of Employment Security Rules § A71-07-1:6 (III)H (See Appendix A). Therefore, plaintiff met the requirements of defendant's regulation and should have been found to have had good cause for his late-filed hearing request.

Defendant's position is supported by a review of related regulations promulgated by defendant which contemplate that under certain circumstances a decision would be physically handed to a prospective appellant. For example, Utah Dept. of Employment Security Rules § A71-07-1:6 (III)C (See Appendix "A") provides, in part: "If a decision by the Department is personally given to a party rather than sent through the mail, the amount of time permitted for an appeal is ten calendar days..." (Emphasis added) Similarly, subpart E provides:

> In computing the period of time allowed by the Act for filing appeals under this section, the day the decision is mailed or handed to a party is not to be included. (Emphasis added)

The clear import of defendant's regulations is that under certain circumstances a decision should be handed to a prospective appellant. There is nothing that would have prevented Job Service employees from physically handing plaintiff a copy of the overpayment determination in November, 1985, when he made contact with their office. The employees not only failed to do so, but by their affirmative

conduct, misled defendant into thinking that he had no other recourse than to repay the amount.

C. The Court Failed to Address the Meaning of Continuing Jurisdiction Under U.C.A. § 35-4-6(b).

Plaintiff in his briefing raised the issue of whether the defendant had continuing jurisdiction to review his case, since it involved an alleged fraud overpayment. The statute in question establishes two classifications of cases under which continuing jurisdiction exists: (1) those cases involving a claim for benefits, and (2) those involving fraud or a claimant's fault. U.C.A. § 35-4-6(b) The statute contemplates that decisions involving a claim for benefits may be reviewed within one year on the basis of a change in conditions or because of a mistake as to fact. The statute then establishes a second class of cases, fraud or claimant fault, to which the one year limited jurisdiction does not apply.

The defendant's regulations promulgated under the authority of the statute further support the conclusion that a fraud case is entitled to unlimited continuing jurisdiction. The regulations at Utah Dept. of Employment Security Rules § A71-07-1:6 (II) (Appendix "B") establish a section entitled "LIMITED JURISDICTION" wherein (1) a change in conditions or (2) a mistake as to facts is required. The regulations then set out a separate section entitled "UNLIMITED JURISDICTION" which pertains to fraud or fault overpayments. It provides, in part:

> There is no time limitation on exercising jurisdiction if there was fraud or a overpayment as the result of fault by the claimant. [sic.] Utah Dept. of Employment Security Rules § A71-07-1:6 (II)C

A further provision of the defendant's regulation labeled "DISCRETION" provides:

> Jurisdiction will be taken in all cases where the department is aware of a claimant fault overpayment which is large enough to be 'set up' as provided by the rules pertaining to section 35-4-6(d). Utah Dept. of Employment Security Rules § A71-07-1:6 (II)D.

In this case, clearly plaintiff's overpayment has been "set up", since he has received notice to begin repayment and has made the necessary arrangements to do so. In view of the harsh penalty imposed for an alleged fraud overpayment, the requirement of continuing jurisdiction is understandable.

CONCLUSION

For the foregoing reasons, plaintiff urges the court to rehear his case. Counsel for the petitioner further certifies that his petition is presented in good faith and not for delay, since the plaintiff has already begun making repayment of the alleged overpayment. The granting of a hearing would not necessarily eliminate the overpayment entirely, but would allow him to disprove the alleged fraud in his case.

DATED this 8th day of Dec., 1987.

Respectfully submitted,

Michael E. Bulson
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I have mailed four true and correct copies of the above PETITION FOR REHEARING to the Attorneys for Defendant: DAVID L. WILKINSON, Attorney General of Utah, at State Capitol Building, Salt Lake City, Utah 84114, and LINDA WHEAT FIELD, Special Assistant Attorney General, Department of Employment Security, at 1234 South Main Street, P. O. Box 11600, Salt Lake City, Utah 84147, via first-class U.S. Mail, postage prepaid, this 8 day of Dec, 1987.

Michael E. Bulson
Attorney for Plaintiff

(III) PROVISIONS FOR FILING AN APPEAL

Section 35-4-6(c) The claimant or any other party entitled to notice of a determination as herein provided may file an appeal from such determination with an appeal referee within ten days after the date of mailing of the notice to his last known address or, if such notice is not mailed, within ten days days after the date of delivery of such notice.

APPEAL NOTICE

Unless the appeal or referral is withdrawn with his permission, the appeal referee, after affording the parties reasonable opportunity for a fair hearing, shall make findings and conclusions on the basis thereof affirm, modify, or reverse such determination; provided, the referee shall give notice of the pendence of an appeal to the commission, which may thenceforth be a party to the proceedings.

COPY OF DECISION

The parties shall be promptly notified of such referee's decision and shall be furnished with a copy of the decision and the findings and conclusions in support thereof and such decision shall be deemed to be final unless, within ten days after the date of mailing of notice thereof to the party's last known addres, or in the absence of such mailings, within ten days after the delivery of such notice, further appeal is initiated pursuant to the provisions of section 35-4-10.

A. GENERAL DEFINITION

This provision of the act provides the opportunity for any parties affected by decisions made by the Department to file an appeal. The time limitations for filing appeals, which includes protests, requests for hearings, petitions and other requests or applications, and the exceptions to those time limitations are explained herein. This section also provides provisions for withdrawing appeals, explains the opportunities which must be provided to parties to assure a fair hearing; identifies the commission as a party to the hearing; specifies the requirements of notification of the referee's decision; and explains the further rights of appeal.

B. ISSUANCE OF DETERMINATIONS

A notice of determination is not considered to have been issued unless it is sent through the U.S. mail or served in person.

C. APPEAL TIME LIMITATION FOR DECISIONS THAT ARE NOT MAILED

If a decision issued by the Department is personally given to a party rather than sent through the mail, the amount of time permitted for an appeal is ten calendar days unless otherwise specified on the decision or by the Act.

D. APPEAL TIME LIMITATION FOR DECISIONS WHICH ARE MAILED

If a decision issued by the Department is mailed, three days are added to the time prescribed by the Act for filing the appeal. Therefore, the amount of time permitted for filing an appeal from any decision that is mailed by the Department is thirteen calendar days unless otherwise specified on the decision or by the Act.

E. COMPUTATION OF TIME LIMITATIONS

In computing the period of time allowed by the Act for filing appeals under this section, the day the decision is mailed or handed to a party is not to be included. The last day of the appeal period that follows is to be included in the computation unless it is a Saturday, Sunday or legal holiday when the offices of the Department are closed. If the last day permitted for filing an appeal falls on a Saturday, Sunday or legal holiday, the time permitted for filing a timely appeal will be extended to the next day when the offices of the Department are open.

F. DATE OF RECEIPT

Any appeal which has been sent through the U.S. mail is considered filed and received by the Department on the date shown by the post office cancellation mark. When the post mark date cannot be established because it is illegible, erroneous or omitted, the appeal will be considered filed on the date it was mailed if the sender establishes that date by competent evidence and can show that it was mailed prior to the date of actual receipt. If the date of mailing cannot be established by competent evidence, the document will be considered filed on the date it is actually received by the Department as shown by the Department's date stamp on the document or other credible evidence such as a written notation of the date of receipt.

G. LIMITATION OF JURISDICTION

When it appears that an appeal may not have been filed within the time allowed by the Act or these Rules, the appellant will be notified and given an opportunity to show that the appeal was timely or was delayed for good cause. If it is found that the appeal was not filed within the applicable time limit and the delay was without good cause, the Administrative Law Judge will not have jurisdiction to consider the merits unless jurisdiction is established in accordance with provisions of Section 35-4-6(b) of the Act. Any decision with regard to jurisdictional issues will be issued in writing and given or mailed to all interested parties with a clear statement of the right of further appeal or judicial review.

H. GOOD CAUSE FOR NOT FILING WITHIN TIME LIMITATIONS

A late appeal may be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause is limited to circumstances where it is shown that:

1. The appeal was filed within 10 days of actual receipt of the decision if such receipt was beyond the original appeal period and not the result of willful neglect; or

2. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or

3. The appellant delayed filing the appeal for circumstances which were compelling and reasonable.

I. PROCEDURE FOR FILING AN APPEAL

An appeal must be filed in writing by mailing a signed letter to the mailing address of the Appeals Tribunal as shown on the notice of decision, or submitting a written statement at a Job Service office in Utah or in the state in which the appellant resides. The appeal must be signed by an interested party who has a right to notice of a determination unless it can be shown that the interested party has conveyed in writing the authority to another person to act in his behalf, or he is physically or mentally incapable of acting in his own behalf. The statement of appeal should give the date and issue of the decision being appealed, the social security number of any claimant involved, the employer number or case number of the decision, a statement of the intent of the appeal and the facts or reasons which support the request. However, the failure of an appellant to include such information will not preclude the acceptance of an appeal. The scope of review will not be limited to the issues or contentions stated in the appeal. If the Department has begun payment of benefits to a claimant, such payments will not be discontinued pending the outcome of an appeal even if the claimant is willing to waive his right to payment. However, if benefits are denied as a result of the appeal an overpayment may be established in accordance with provisions of either Section 35-4-6(d) or 35-4-6(e) of the Act.

J. REASONABLE OPPORTUNITY FOR FAIR HEARING

1. Notice

a. All interested parties will be notified by mail at least seven days prior to the hearing of:

(1) The time and place, or conditions of the hearing,

(2) The legal issues,

(3) The consequences of not appearing, and

(4) The procedures and limitations for requesting rescheduling.

b. When a new issue arises during the hearing or under other unusual circumstances, advance written notice may be waived by the parties after a full verbal explanation of the issues and potential results.

c. It is the responsibility of the parties to a hearing to notify any representatives or witnesses of the time and place of the hearing and to make necessary arrangements for their participation.

d. If a party has designated a person or professional organization as his agent, notice of hearings will be sent to that agent and when such notice is sent, it will be considered that the party has been given notice.

e. If an interpreter is needed by any parties or their witnesses, the party should arrange for an interpreter who is an adult with fluent ability to understand and speak english and the language of the person testifying, or notify the Appeals Office at the time the appeal is filed, (or when notification is given that an appeal has been filed), that assistance is required in arranging for an interpreter.

2. Hearing of Appeal

a. All hearings will be conducted informally and in such manner as to protect the rights of the parties. All issues relevant to the appeal will be considered and passed upon. The decision of the Appeals Referee, hereafter referred to as Administrative Law Judge, will be based solely on the testimony and evidence presented at the hearing.

b. All testimony of witnesses will be given under oath. Any party to an appeal will be given an adequate opportunity to be heard and present any pertinent evidence of probative value and to know and rebut by cross-examination or otherwise any other evidence submitted. The Administrative Law Judge will direct the order of testimony and rule on the admissibility of evidence. Oral or written evidence of any nature, whether or not conforming to the legal rules of evidence, may be accepted and will be given its proper weight. However, no finding of fact will be based solely on contested hearsay. Any official records of the Department, including reports submitted in connection with the administration of the Employment Security Act may be included in the record. The Administrative Law Judge may take such additional evidence as is deemed necessary.

c. The parties to an appeal, with consent of the Administrative Law Judge, may stipulate to the facts involved. The Administrative Law Judge may decide the appeal on the basis of such facts, or in his discretion, may set the appeal for hearing and take such further evidence as deemed necessary to determine the appeal.

d. The Administrative Law Judge may require portions of the evidence to be transcribed as necessary for rendering a decision.

K. RESCHEDULING AND ADJOURNMENT OF HEARINGS

1. The Administrative Law Judge may, at his discretion, adjourn or continue a hearing on his own motion.

2. Prior to the Hearing

A hearing before an Administrative Law Judge may be rescheduled or postponed for reasonable cause if the request is made to the Administrative Law Judge orally or in writing before the hearing is concluded. Such a request may be made by any interested party, however, more than one continuance will not normally be granted if it adversely impacts on the other parties rights to benefits or potential liability for benefit costs. Reasonable cause may not be established solely because of such things as:

a. Conflicting personal or business plans or appointments of the parties or their witnesses that could reasonably be rearranged,

b. Failure to make timely arrangements for witnesses or to request subpoenaes of witnesses,

c. Failure to arrange for legal counsel in sufficient time to prepare for the hearing,

d. Failure to obtain pertinent documents which could reasonably have been obtained prior to the hearing,

e. Lack of preparation.

3. If one of the parties fails to appear at the hearing, the Administrative Law Judge will, unless there is good cause for continuance, issue a decision based on the available evidence.

4. After the Hearing

Any party who fails to participate personally or by authorized representative at a hearing before an Administrative Law Judge may, within seven days after the scheduled date of the hearing, make a written request for reopening of the hearing. Such petition will be granted if good cause is shown for failing to participate. A request for reopening made after the scheduled hearing must be in writing; it must state the reason(s) believed to constitute good cause for failing to participate at the hearing; and it must be delivered or mailed within a seven day period to the Appeals office or to an office of the Department of Employment Security or to a Job Service office in any state. If the request for reopening is not filed within seven days, reopening will not be granted unless the party can show good cause for failing to make the request within the seven day time limitation. If

a request for reopening is not allowed, a copy of the decision will be given or mailed to each party, with a clear statement of the right of appeal or judicial review. If a request for reopening is made, a hearing will be scheduled and notice will be given or mailed to each party to the appeal, to determine if there is good cause for reopening the hearing.

a. Failure to report as instructed at the time and place of the scheduled hearing is the equalivant of failing to participate even if the party reports at another time or place. In such circumstances, the party must make a written request for rescheduling and show good cause in accordance with these Rules before the matter will be rescheduled.

b. Good cause for failing to participate in an appeal hearing may not include such things as:

(1) Failure to read and follow instructions on the notice of hearing,

(2) Failure to arrange personal circumstances such as transportation or childcare,

(3) Failure to arrange for receipt or distribution of mail,

(4) Failure to deligate responsibility for participation in the hearing,

(5) Forgetfulness.

c. In the event that an appeal has been taken or an application for review has been made to the Board of Review before the request for reopening is filed, such request will be referred to the Board of Review.

L. WITHDRAWAL OF APPEAL

Any party who has filed an appeal from a decision of the Department may reques withdrawal of the appeal by making a request to an Administrative Law Judge explaining the reasons for the withdrawal. The Administrative Law Judge ma deny such a request if the withdrawal of the appeal could result in a disservic to any of the parties, including the Commission.

M. COMMISSION A PARTY TO PROCEEDINGS

The Department is the authorized agent of the commission. The Act requires tha the commission be given notice of the pendancy of an appeal and that the commis sion will be a party to the proceedings. Unless the Department designates representative who is authorized to represent the Department in appeals, notifica tion of appeals will be sent to the local office which rendered the initi determination. As a party to the hearing the Department or its representativ have all the rights and responsibilities of other interested parties to prese evidence, bring witnesses, cross-examine witnesses, give rebuttal evidence, a

appeal decisions of the Administrative Law Judge. Where the burden of proof is with the Department, the failure of the Department to meet that burden may result in an unfavorable ruling for the Department. The Administrative Law Judge cannot act as the agent for the Department, and therefore is limited to including in the record only that evidence which is in the Deparment files or submitted by Department representatives. Witnesses for the Department may be called on the motion of the Administrative Law Judge when the need for such testimony is necessary to clarify rather than impeach the testimony or evidence presented by the other parties, or the need for such witnesses or evidence could not have been anticipated by the Department prior to the hearing.

N. PROMPT NOTIFICATION OF DECISION

All decisions by Administrative Law Judges which effect the rights of any party with regard to benefits, tax liability, or jurisdictional issues will be issued (mailed to the last known address of the parties or delivered in person) in writing with a complete statement of the findings of fact, reasoning and conclusions of law. Each appeal decision which is sent to the parties will include or be accompanied by a notice specifying the further appeal rights of the parties. The notice of appeal rights shall state clearly the place and manner for taking an appeal from the decision and the period within which an appeal may be taken.

O. FINALITY OF DECISION

Decisions of the Administrative Law Judge are binding on all parties and are the final decision of the commission as provided by Section 35-4-10(f) unless appealed within ten days of mailing or delivery of the decision.

A71-07-1:6 DEPARTMENT OF EMPLOYMENT SECURITY -- RULES AND REGULATIONS

(II) CONTINUING JURISDICTION

> Section 35-4-6(b) Jurisdiction over benefits shall be continuous. Upon its own iniative or upon application of any party affected, the commission or its authorized representatives may on the basis of change in conditions or because of a mistake as to facts, review a decision allowing or disallowing in whole or in part a claim for benefits. Such review shall be conducted in accordance with such regulations as the commission may prescribe and result in a new decision which may award, terminate, continue, increase, or decrease such benefits, or may result in a referral of such claim to an appeal tribunal. Notice of any such redetermination shall be promptly given to the party applying for redetermination and to other parties entitled to notice of the original determination, in the manner prescribed in this section with respect to notice of an original determination. Such new order shall be subject to review and an appeal as provided in this section. No review shall be made after one year from the date of the original determination except in cases of fraud, or claimant fault, as provided in subsection (d) of this section.

A. GENERAL DEFINITION

This section of the Act specifies the conditions under which the Department, as the agent of the commission, has the authority to reconsider decisions made with regard to claims for benefits after they have become final. A decision is not final until the time permitted for the filing of an appeal has elapsed. There are no limitations on the review of decisions during the appeal period. Section 35-4-10(f) states that decisions made by the Department are final and conclusive for all purposes affecting the commission, the claimant and all employing units that had notice of the determination unless it is appealed by one of the parties, or jurisdiction is established under one of the provisions of Section 35-4-6(b). This regulation establishes the guidelines for the Department's exercise of discretion in reviewing decisions.

B. LIMITED JURISDICTION

The Department has no jurisdiction to review or reconsider final decision with regard to benefits beyond one year from the date of the decision unless the claimant was at fault in creation of an overpayment. Jurisdiction may be taken for up to one year after the original determination was made provided there was either: 1. a change in conditions, or 2. a mistake as to fact. When a decision is made on an issue, the date shown by the Department Representative on the notice provided to the parties or the date the decision is recorded in the Department's records is the date of the decision. If a decision was n

made, the date the Department was on notice of an issue but failed to act is the date of the decision.

1. Change of Conditions

A change of conditions may include, but is not limited to, a change in the law which would make a reconsideration necessary in fairness to the parties who were adversely affected by a law change. A change in conditions may also include personal circumstances of the claimant or employer which would have made it reasonable not to file an appeal, provided those circumstances have subsequently and unforeseeably changed.

2. Mistake as to Facts

A mistake as to facts is limited to material information which was the basis for the decision. A mistake as to facts may include information which is misunderstood or misinterpreted, but does not include an error in the application of the Act or the Rules provided the decision is made under the correct section of the Act. A "mistake" is inadvertent rather than wrong information intentionally provided by the party subsequently alleging the mistake.

C. UNLIMITED JURISDICTION

There is no time limitation on exercising jurisdiction if there was fraud or a overpayment as the result of fault by the claimant. There must be an overpayment which is charged to the claimant in accordance with provisions of Section 35-4-6(d) before jurisdiction can be taken beyond one year after the original determination.

D. DISCRETION

The statute does not require the Department to take jurisdiction in all cases where there is a change in conditions or a mistake as to facts; the statute merely permits the Department to take jurisdiction. The claimant and employer may request a reconsideration of a decision, but they cannot compel the Department to exercise continuing jurisdiction. The Department will exercise continuing jurisdiction if it is necessary in fairness to an interested party who did not have access to material information or could not reasonably have filed an appeal provided there was a mistake as to facts or a change in conditions. However, jurisdiction may not be taken if the redetermination would have little or no effect. The Department will weigh the administrative burden of making a redetermination against the requirements of fairness and the opportunities of the parties affected to file an appeal. Jurisdiction will be taken in all cases where the Department is aware of a claimant fault overpayment which is large enough to be "set up" as provided by the Rules pertaining to Section 35-4-6 (d).

E. OBLIGATION OF DEPARTMENT EMPLOYEES

Employees of the Department are obligated, regardless of when the information is discovered, to bring to the attention of the proper Department representatives

any information that may affect an individual's eligibility for unemployment insurance benefits or information affecting the employer's contributions.

F. NOTICE

Any time a decision is reconsidered all interested parties will be notified of the new information and provided an opportunity to attend hearings held in conjunction with the review. All interested parties will receive notification of the redetermination and given the right to appeal.